Supreme Court, U.S.
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No. 96-1139

In The

Supreme Court of the United States

October Term, 1996

ROBERT LLOYD MORROW,

Petitioner,

and THE CHEROKEE NATION,

Plaintiff-Intervenor,

v.

THE HONORABLE DAVID WINSLOW, Judge of the District Court of Tulsa County, State of Oklahoma, JOHN AND JANE DOE prospective adoptive parents,

Respondents,

and

CAROL DERONE GRANT,

Respondent-Intervenor.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

RESPONSE TO PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

I. The Fundamental Issue In This Case Is Interpretation Of Oklahoma Law 3

II. Petitioner Is Precluded From Seeking Review In This Court At This Stage of State Court Proceedings 4

III. Absentia Is Appropriate When Participation And Remedies Have Been Afforded And Are Available In State Court 5

IV. Petitioner's Attorney Is Disqualified From Engaging In The Private Practice Of Law ... 6

CONCLUSION 7

TABLE OF CITATIONS

Page

CASES CITED:

In the Matter of the Adoption of DMJ, 741 P.2d 1386 (1985) 3

Matter of Adoption of Baby Boy D, 742 P.2d 1059 (Okla 1985), cert den., 484 U.S. 1072 3

Moore v. Sims, 442 U.S. 450 (1979) 6

Rooker v. Fidelity Trust, Co., 263 U.S. 413 (1923) 6

Younger v. Harris, 401 U.S. 37 (1971) 6

FEDERAL STATUTES CITED:

25 U.S.C.A. § 1901 3

OKLAHOMA STATUTES CITED:

10 O.S.A. § 40.1 4

19 O.S.A. § 138.4 ..... 6, 7

RULES OF PROFESSIONAL CONDUCT CITED:

Rule 1.11, Oklahoma Rules of Professional Conduct 7

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, John and Jane Doe, the adopting parents, and the Honorable David Winslow, Judge of the District Court of Tulsa County, Oklahoma, pray that this Honorable Court deny Petitioner's request for a Writ of Certiorari. This adoption case involves the interpretation of Oklahoma Supreme Court decisions and legislation rather than federal law and has been tried by Petitioner to a conclusion in state court where the decision was adverse to Petitioner. The Petitioner has appealed the state trial court decision to the Supreme Court of Oklahoma where it is pending. The Respondents demonstrated in federal court and in state court that there has been no actionable violation of the Indian Child Welfare Act, the Oklahoma Indian Child Welfare Act or of any other applicable law. Petitioner, being unhappy with the results in state court, where he has fully participated and has adequate remedies which he is currently seeking, only attempts by the request for certiorari to involve federal courts in the day-to-day operations and minutia of state court adoption proceedings. States have a substantial interest in the well being of all children within their borders and state courts are the most appropriate forums in which to litigate adoptions. Additionally Counsel for Petitioner is precluded at this time under Oklahoma law from engaging in the private practice of law.

OPINIONS BELOW

See Petitioner's Appendix setting forth the decision of the Tenth Circuit reported at 94 F.3d 1386. Petitioner also has an appeal pending in the Oklahoma Supreme Court in a case styled In the Matter of the Adoption of CMG, case number 88,553.

STATEMENT OF THE CASE

Petitioner is the father of the child the respondent adopting parents adopted. Carol Derone Grant is the mother of the child and the Honorable David Winslow was the state trial court judge before whom the adoption was filed. Months before the child was born Petitioner advised he would not oppose adoption and Cherokee Nation specifically approved adoption by the Respondent parents. Only after the child was born, placed with Respondents and adoption proceedings begun did Petitioner and Cherokee Nation dispute the adoption. Petitioner literally attacked the entire adoption process and centered the Indian issues around amendments made to the Oklahoma Indian Child Welfare Act. Petitioner asserted that the state amendments abolished prior Oklahoma case decisions rendering the adoption improper under the Oklahoma Indian Child Welfare Act and the Indian Child Welfare Act.

After full participation in the state court proceeding up to literally the week before the case was set for trial the Petitioner and Cherokee Nation filed their collateral attack in Federal District Court where the trial court

found no violation. That decision was appealed by Petitioner, but not by Cherokee Nation, to the Tenth Circuit where the case was returned to District Court for dismissal. The case proceeded to trial in state court where the Honorable David Winslow recused himself and the case was heard by another judge. After a complete evidentiary trial the state court ruled against the Petitioner and Cherokee Nation. The Petitioner, but not Cherokee Nation, appealed the state trial court decision to the Oklahoma Supreme Court where it is now pending. Additionally, the state trial court has disqualified Petitioner's attorney from further participation in proceedings in the state trial court and a motion to disqualify Petitioner's attorney is pending in the Oklahoma Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE FUNDAMENTAL ISSUE IN THIS CASE IS INTERPRETATION OF OKLAHOMA LAW.

The case of *Matter of Adoption of Baby Boy D*, 742 P.2d 1059 (Okla. 1985), cert den., 484 U.S. 1072, established in Oklahoma what is often referred to as the Indian family doctrine of the Indian Child Welfare Act, 25 U.S.C.A. § 1901 et seq. This case is squarely within the doctrine of the *Baby Boy D* case which is contrary to Petitioner's assertions. See also *In the Matter of the Adoption of DMJ*, 741 P.2d 1386 (Okla. 1985).

In 1994 the Oklahoma Legislature made amendments to the Oklahoma Indian Child Welfare Act, 10 O.S.A. § 40.1 et seq. Petitioner claims the amendments abolished the holding in the *Baby Boy D* case and from that he argued that what had been proper under the doctrine would now be a violation of both the Indian Child Welfare Act and the Oklahoma Indian Child Welfare Act. Whether or not Oklahoma legislation eliminated the *Baby Boy D* doctrine is a question for the Oklahoma Supreme Court.

Petitioner has sought and still seeks his remedy in state court but attempts to interject the federal courts into a super review process of state adoptions. Petitioner within the state review process has open to him an appeal to this Court but only after the appropriate state court has determined the effects of a change in state law.

II.

PETITIONER IS PRECLUDED FROM SEEKING REVIEW IN THIS COURT AT THIS STAGE OF THE STATE COURT PROCEEDINGS

Petitioner has fully participated in the state court proceedings in a process involving several hearings as well as separate evidentiary trials on whether or not he had a right to consent to adoption and whether or not finalization of the adoption was in the child's best interests. In all instances the trial court found against the father and he has filed an appeal with the Oklahoma Supreme Court seeking review of the legal and factual issues. Petitioner's filing in federal District Court was

simply a collateral attack on the state court and his seeking review in this Court is only a continuation of the collateral attack. If the father is unhappy with the decision of the Oklahoma Supreme Court he may then seek review in this Court.

III.

ABSENTIA IS APPROPRIATE WHEN PARTICIPATION AND REMEDIES HAVE BEEN AFFORDED AND ARE AVAILABLE IN STATE COURT

Adoption law is a matter of individual state law and concern and involves a factual determination of a child's best interests and the fitness of adopting parents. The Indian Child Welfare Act allows intervention and participation in adoption cases involving Indian children by parents and Indian Nations. However, that involvement is but a part of the larger potentially complicated factual picture of the child's best interests and the adopting parties' fitness.

The Petitioner and Cherokee Nation were never denied a right to participate and present evidence in the state adoption case. In fact they had every opportunity to do so and actively and aggressively did participate. This would be a different situation if Petitioner were denied the right to be heard. If the federal courts do not abstain under circumstances when full participation is afforded the complaining party in state court, and he has and continues pursuing full and adequate remedies in state court then chaos could be created. How in depth would federal review be in an adoption case? Will this Court review home studies of Indian families? Will this Court

review which of competing parties in an adoption is most "Indian?" Absentia can prevent legal chaos, forum shopping and make for judicial efficiency. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Younger v. Harris*, 401 U.S. 37 (1971); and *Moore v. Sims*, 442 U.S. 450 (1979).

IV.

PETITIONER'S ATTORNEY IS DISQUALIFIED FROM ENGAGING IN THE PRIVATE PRACTICE OF LAW.

During the course of the state trial the Office of the Public Defender of Tulsa County, Oklahoma represented the child, Petitioner's attorney represented the father and Ms. Lisa Frasier represented Cherokee Nation. Prior to submission of the Petition for Certiorari both Mr. Smith and Ms. Frasier became full time employee attorneys of the Office of the Public Defender as Assistant Public Defenders. On January 16, 1997, the state trial court disqualified Mr. Smith from further representation of the Petitioner in the trial court. Mr. Smith and Ms. Frasier continue as full time Assistant Public Defenders for Tulsa County, Oklahoma.

Oklahoma law, 19 O.S.A. § 138.4, specifically prohibits full time Assistant Public Defenders from engaging in any practice of law except in his or her performance of duties as an Assistant Public Defender. Not only is Mr. Smith now a full time employee of the very entity that represented the child in the litigation, by pursuing this appeal he is clearly violating the statute. This cannot be allowed.

Further, Rule 1.11 of the Oklahoma Rules of Professional Conduct prohibits a lawyer serving as a public officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice except as law may otherwise expressly permit. The applicable statute, 19 O.S.A. § 138.4, makes no exception for Assistant Public Defenders to engage in the private practice of law nor does it allow them to ignore the Rules of Professional Conduct. In pursuing this appeal Mr. Smith is violating rules of professional conduct.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectively submitted,

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